EXPROPRIATION BY INTERNATIONAL ARBITRATION.

INTERNATIONAL arbitration is meant, it is believed, to substitute for military conflict, for the heat and friction which at times, even without war, most injuriously divide nations, rouse apprehensions, and destroy beneficial intercourse, for the pressure and intrigue which overcome weaker nations and deprive them of what is justly theirs, to replace all these by a fair judgment between the opposing parties derived from an impartial source, after due hearing to which not only the conduct conforms, but the minds of the contestants yield acquiescence.[1]

In the main the principles of international justice are identical with those of private or municipal justice, and we must anticipate and welcome a constant assimilation of the two in procedure and achievement.

A considerable class of conflicts exists, not of rights, with which arbitration now deals, but of needs and interests, with which it wholly fails to deal.

The inability of arbitration to deal with needs which are not rights was never more strikingly illustrated than by the Behring Sea Award. I think it was there made quite plain that a useful industry would be much diminished, if not destroyed, unless it were controlled and regulated. This necessity, however, could be given no weight by the arbitrators; but, it being found that the United States had no right over the Behring Sea beyond the three-mile limit, its attempt to control seal fisheries therein wholly failed, however salutary such control might be, and the award was against it.

National statutes and courts cannot always deal with these questions. There is one class of needs, however, dealt with by municipal law, and dealt with successfully, and with steadily increasing frequency, adequacy, and ease, which is not as yet within the scope of international arbitration.

I refer to that class met by the exercise of what is variously called the Power of Eminent Domain, or Expropriation. A small and private interest is by a just procedure compelled to yield to a

[1] See, for discussion of the judicial character of international arbitration, 7 Moore, Dig. Internat. Law, 24.

large and public interest, receiving in return adequate compensation for loss or inconvenience suffered. Formerly under English law it was a power which Parliament exercised and rarely, if ever, confided. Now it is everywhere provided for by statutory proceedings largely controlled by the courts. It has rendered possible many of the greatest undertakings, and especially those which have made intercourse between remote regions convenient and beneficial, and such intercourse and the interdependence that ensues are as great humanizing, peace-making, and civilizing factors in the world as we can name; and has alike aided on a vast scale reclamation of swamp lands and arid regions by artificial drainage or irrigation.

Mr. Randolph, in his learned work on eminent domain, points out[1] that "The right of eminent domain can be exercised only within the jurisdictional limits of the state. These limits are usually territorial. . . . It is, of course, inconceivable that a sovereign should contemplate the direct expropriation of property within a foreign state. Such action would be clearly unwarrantable." And the late David Dudley Field[2] treats the right as limited to the territory of the sovereign exercising it, except that he may condemn, "with the consent of any other nation, property within the territory limits of such other nation."

With the energetic advance of engineering science problems of this sort, which are interstate and international, have recently arisen with striking frequency. The courts are confronted with the plain proposition that no state can exercise the right of eminent domain within the sovereignty of another, and human convenience and necessity are defied.

The subject "Eminent Domain" is indexed and described by some writers on international law as Grotius, Puffendorf, and Vatell.[3] But it will be found that they deal merely with expropriation within the nation and leave the international question untouched.

The case of Naboth's vineyard, often cited as the earliest precedent, is not international.[4]

Mr. Randolph shows[5] that "During the seventeenth and eigh-

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[1] Randolph, Em. Domain, 27.

[2] Field, Internat. Code, 2 ed., 20.

[3] See Lewis, Em. Domain, 9; Grotius, Peace and War, c. 8, § 21; Puffendorf, B. 8, c. 551 (English translation, 1703); 1 Vatell, Law of Nations, B. 1, c. 44, § 245.

[4] Randolph, Em. Domain, 3.

[5] P. 5.

teenth centuries the manifestations of the right of eminent domain increased, owing to the extension and gradually centralized administration of public works and the growth of equitable judicial ideas."

He argues that the realty of a foreign minister which is foreign territory for some purposes may be subjected to the right of eminent domain simply because the ultimate sovereignty is in the local government,[1] and in a note says: "The method by which the old Protestant cemetery at Rome was taken for a municipal use is not without interest. This cemetery was placed under control of the Prussian representative near the papal court many years ago, and was managed thereafter by the Prussian, and later by the German representative, with whom were associated a committee representing the other Protestant powers. The city of Rome decided to lay out a street through the cemetery, and after a correspondence, in which the power to expropriate does not seem to have been questioned, the German embassy ceded the cemetery to the city authorities, who on their part ceded a tract for a new cemetery, assumed the expense of reinterment, and further agreed to preserve the tomb of Keats."[2]

The question has been discussed whether a railway chartered by federal law, and given by that law the right of eminent domain, can condemn state land. Mr. Randolph collects the cases to the point that United States rights are in this higher than state rights, but that the agencies of the state are beyond federal aggression,[3] and suggests that the power of a state must yield when acquisition by the federal government is more important to the United States than its retention is to the state. For example, although a necessity might arise to warrant the expropriation of a state capitol for a fortification site, it should not be assumed to justify the transformation of a capitol into a post-office, though he points out this view conflicts with an illustration of Justice Brewer in St. Louis *v.* W. U. Tel. Co.,[4] where he seems to think the capitol could be taken by the railway on paying its value. These questions are, however, wholly constitutional.

Take a few cases in point, however, which have arisen between the states of the United States of America or between wholly independent nations as examples and illustrations of interstate needs

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[1] P. 54.
[2] See Parl. Pub. Italy, No. 1, 1887.
[3] P. 56.
[4] 118 U. S. 92.

and difficulties in the lines indicated. Of course the cases arising within the United States may involve also constitutional considerations which we need not consider; but, though made justiciable by the constitution, they turn mainly or wholly on rules of international law.

New York City needs to take advantage of adjacent territory for its water supply. A large part of that territory belongs to New Jersey. The State of New York cannot authorize any appropriation of the waters of New Jersey, and it is even doubtful whether the State of New Jersey can authorize condemnation of property within her borders to serve the public utilities of any neighboring state. Thus in the recent case of McCarter *v.* Hudson Co. Water Co.,[1] the court says: "We have been privileged to see in print an opinion recently submitted to the Merchants' Association of New York by Mr. Randolph, author of the well-known work on eminent domain, upon the question of an interstate water supply for that city. Referring to that interest in water which each state possesses as the guardian of its community, he says, 'I think it is clear that the right of an individual or a corporation to divert water, whether gained by public grant or by prior appropriation, is presumed to be utilized within the state, which may forbid the carriage of the water beyond its bounds.' Again he uses this language, 'And, when we point out that each state holds all the property in its territory free from the eminent domain of another, and cannot be compelled to surrender its property to another in any way, I think we approximate the irreducible measure of sovereignty in this relation.'" The court goes on to hold that neither the state nor people of New York have any inherent right to withdraw a supply of water from the territory of New Jersey by artificial means, so that some millions of citizens on one side of a boundary line may not get the advantage of a convenient water supply unappropriated and flowing unused to the sea, even on making due compensation to all concerned, because a boundary line intervenes and there is no known means of getting over that imaginary obstacle.

Yet a good water supply materially lowers the death-rate of a city and so protracts human life. Though Professor Westlake has said, concerning the right of self-preservation recognized in international law,[2] that "one great function of law is to tame it," yet, if law would limit such a fundamental right, it ought only to be upon a good reason given.

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[1] 65 Atl. 498 (N. J.).

[2] Westlake, Internat. Law, c. 8, p. 3.

Controversy has arisen between Kansas and Colorado as to the right of the latter to appropriate the waters of the Kansas River. That important stream rises in the Colorado mountains and flows for about 280 miles through the territory of that state, and then for about 310 miles through the territory of the State of Kansas. The matter has been twice carried to the Supreme Court of the United States by the latter state, in an attempt to prevent the diversion of the waters of the river by or under the authority of the upper state.

In 1902, in Kansas *v.* Colorado,[1] that court recognized that "the remedies resorted to by independent states for the determination of controversies raised by collision between them were withdrawn from the states by the Constitution. A wide range of matters susceptible of adjustment and not purely political in their nature were made justiciable by that instrument," and therefore the court entertained a bill by the State of Kansas to prevent Colorado from diverting or authorizing the diversion of the waters of this river.

In the present year the court dismissed this suit without prejudice to like suit at a later time, on the ground that Kansas had as yet showed no substantial injury.[2] No method appears by which for most necessary and valuable purposes of mining and irrigation Colorado could obtain the right to divert this water beyond such use as is legal to riparian proprietors if it inflicted substantial injury on Kansas, though it might do vastly greater good to Colorado, and she might be able and willing to pay for such injury twice over. The case illustrates the difficulties arising from a boundary line, which seems insurmountable even between states in such close alliance as those of this Union.

A controversy involving like difficulties has arisen between the states of Missouri and of Illinois concerning the disposal of the drainage of Chicago, the second city of the nation, with a rapidly increasing population of between two and three millions. By a great canal the festering waters of the stagnant Chicago River, which are cleansed by no rising and falling marine tide, are made to run backward and to draw a plentiful supply of pure water from Lake Michigan, and, thus diluted, to ultimately discharge into the great stream of the Mississippi River. The State of Missouri bordering on this river, deeming itself injured,

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[1] 185 U. S. 125.

[2] Kansas *v.* Colorado, 206 U. S. 46.

brought suit against Illinois and the Sanitary District of Chicago.[1] And the Supreme Court of the United States held that such suit was maintainable if damage could be shown, but that there was none shown; and the court says, "If Missouri were an independent and sovereign state, all must admit that she could seek a remedy by negotiation, and that failing by force."

Here again, no matter what the necessity of Chicago or her willingness to make adequate payment, a boundary line prevents an adjustment of rights by condemnation and compensation.

These are merely recent conspicuous and familiar examples of an inconvenience that has been felt a thousand times between separate nations no less than between the states of this Union.

Very great interests required the Suez Canal. The concessions for it were fortunately got; but, if they had been denied, ought the great interests to be sacrificed to the small or compelled to get the concessions by force or overawing?

The Panama Canal is demanded likewise by interests of the vastest extent and most imperative character, shared in by a great part of the world. Concessions have been obtained, but there are those who complain that they were extorted. That question I do not care to discuss; but I ask whether a beneficent project of world-wide importance ought to be absolutely defeated if a local power denies such concessions?

A recent most destructive war which cost many lives and much treasure was largely fought for the possession of a port deemed essential by one power for the great interior country which she already possessed. In the recent South African war deep embarrassment arose from the possession of the interior by one power and of the only port giving access to the same by another.

The claims concerning Alaska, now happily adjusted between the two friendly and kindred nations involved, were made important, and at one time almost difficult, by the possession, for instance, of the Port of Skagway by one country and the possession by another of a greatly developing country of wide extent behind and tributary to it.

Exactly the same complication which arose between Colorado and Kansas as to the Kansas River embarrassed the relations of the United States and Mexico with regard to the Rio Grande River. The waters of that international stream were so exhausted in Colorado and New Mexico that frequently the lower river bed was left

[1] Missouri *v.* Ill. and the Sanitary District of Chicago, 180 U. S. 208.

dry during the greater part of the year for a distance of 500 miles. The treaty between the two nations of May 21, 1906, has adjusted this difficulty by providing for the erection of a great dam at Eagle in New Mexico and for the equitable division of the water between the two nations.

I recur to the beneficial assimilation of international to municipal law and rights. Not so many years ago a corporation, in whose favor the right of eminent domain had been exercised, could not be dispossessed by any subsequent exercise of like right in favor of another. So it was a matter of the utmost difficulty for a canal company or railway company to get the right to cross another. That is now very commonly provided for fully and freely in all cases of necessity.

It will be recalled that the late David Dudley Field, in his "International Code," provided for the condemnation of property in other sovereignties, "with the consent" of such other sovereignty, and Mr. Randolph records an interesting suggestion from an ancient source, saying,[1] "In the Athenian constitution of Aristotle [citing 4 Kenyon's Trans. 72] we are told that a quarrel between Athens and Eleusis was settled upon this condition.

"Among others, if any of the seceding party (discontented Athenians) wish to take a house in Eleusis, the people would help them to obtain the consent of the owner; but, if they could not come to terms, they should appoint three valuers on either side, and the owner should receive whatever price they should appoint."

This comes near to a treaty right of condemnation.

I write without the Algeciras convention before me, but I notice that Morocco has recently adopted regulations regarding expropriation under the general act of Algeciras.[2]

Treaties and international conventions are becoming so full in their friendly provisions, and so completely recognize the community of interest of persons on different sides of boundary lines, that it seems as if we might hope that any international inconvenience would soon be abolished.

M. Merignhac, in his "Traité de Droit public international première Partie," considers recent movements toward international concert in matters of law, and mentions the *consulta* of 1904 between France and Italy as showing a new era in the approaches of the nations to one another. That provides that a citizen of either who has money deposited in the postal savings bank department

[1] Randolph, Em. Domain, 3.

[2] 1 Am. J. of Internat. L. 752.

of one nation may, if he removes to the other, have it transferred to his credit in the like department of his new domicile.

Such agreements make us hope that even the difficulty between nations that has been spoken of may be modified and perhaps removed by general treaties which allow rights of eminent domain in foreign territory for important public service corporations, even if they do not concede territory or jurisdiction. It is a bold dream which conceives of the award, upon due compensation, of a port or of territory very necessary to one power and of small consequence to another, but peace and commerce more and more hold the imaginations of men and war less and less, and this would be one of the victories of peace. Let us fix no limit to them. International arbitral tribunals will undoubtedly become permanent bodies with appointed sessions. The right of eminent domain within a nation's boundaries, formerly rarely exercised, and then by the highest sovereign authority of the state,[1] is now easily and constantly invoked and exercised at the suit of public service companies under statutory provisions largely supervised by the courts. With the growth of international interdependence instead of independent isolation, we may begin to hope for like useful functions and powers under international arbitration.

The establishment of international prize courts for the adjudication of claims to captured vessels and their contents has been advocated by many eminent jurists, as Professor Westlake and Sir Thomas Barclay;[2] and was approved even so early as 1887 by the Institute of International Law, to say nothing of the recent action of the conference at the Hague. International tribunals dealing with condemnation of property rights for the common good by proceedings kindred with those under which the right of eminent domain is now exercised are but a moderate advance beyond such international courts for the condemnation of prizes.

The writer is indebted to Hon. Everett P. Wheeler, of New York, for the ingenious suggestion that the Constitution of the United States forbids any state of the Union "without the consent of Congress" to "enter into any agreement or compact with another state"; that in case of necessity Congress might, therefore, authorize or consent to such agreements or compacts between the several states as seemed required for the adjustment of serious difficulties of the character herein indicated.

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[1] See 1 Bl. Comm., B. 1, c. 1, *139 *et seq.*

[2] See Problems of International Practice and Diplomacy, 105.

An agreement between the states involved to allow expropriation on due compensation made and to submit the whole matter to arbitration, if Congress gave its consent, might be a possible solution of the New York and New Jersey, Kansas and Colorado, Illinois and Missouri problems above indicated, but in so far as the rights of individuals in real property would necessarily be involved it is somewhat uncertain how far this procedure could be made constitutional and practicable, and in so far as in any case it amounts to a surrender of territorial or jurisdictional rights fixed by constitutional provisions, it seems probably beyond the competence of merely statutory action.

The subject has many intricacies and difficulties, the solution of which is not here attempted; but it is submitted that it is among the extensions of arbitration to be considered and wisely shaped by publicists and statesmen.

Even if the nation surrenders in part its right just as the individual loses his property right, it is upon due compensation made. It is part of "the growth of equitable judicial ideas," already alluded to, and, as Mr. T. A. Walker has pointed out,[1] as a result of the needs of international intercourse the strict principles "of territorial sovereignty and its corollaries must be at times affected and relaxed. The progressive improvement of human nature necessarily involves the progressive development of international law." To aid such development should be the very high function of all students of that noble and by no means stagnant part of jurisprudence. Lawyers must not deserve the taunt of Voltaire, who called them the conservers of old abuses, but their ingenuity and prudence must wisely shape a safe and lasting progress. They must help towards the attainment of that "Peace of Justice" which President Roosevelt has pictured as the goal set before all mankind.

Charles Noble Gregory.

UNIVERSITY OF IOWA.

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[1] Walker, Internat. Law, 10, § 1895.